International law vs. The Trent and San Jacinto

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INTERNATIONAL LAW vs. THE TRENT AND SAN JACINTO.

FACTS AS TO SAILING AND ARREST OF MESSRS. MASON AND SLIDELL—PRINCIPLES MORE SATISFACTORY AUTHORITY THAN PRECEDENTS—NATURAL JUSTICE THE FOUNDATION OF INTERNATIONAL LAW—THE RIGHT OF SELF-DEFENCE AND THE DUTY OF NEUTRALS NOT TO BENEFIT EITHER BELLIGERENT NATURALLY FLOW FROM IT—THE SUBJECT OF CONTRABAND OF WAR A NECESSARY CONCLUSION—THE RIGHT OF VISIT AND SEARCH, IN TIME OF WAR, CLEARLY FOLLOWS—THE ACT OF THE CAPTAIN OF THE TRENT IN ALLOWING MESSRS. MASON AND SLIDELL TO TAKE PASSAGE ON HIS VESSEL A GROSS VIOLATION OF THE ABOVE PRINCIPLES—STILL THEIR REMOVAL BY CAPTAIN WILKES WAS WRONG—WE MUST DELIVER THEM UP TO ENGLAND IF SHE PROPERLY DEMANDS IT OF US—WE OWE IT TO OURSELVES NOT TO ALLOW SUCH A CASE TO STAND AS A PRECEDENT—ENGLAND SHOULD BE CALLED UPON TO MAKE REPARATION FOR THE ACT OF THE CAPTAIN OF THE TRENT IN ALLOWING THESE COMMISSIONERS TO TAKE PASSAGE ON HIS VESSEL, &C.

THE seizure of Messrs. MASON and SLIDELL has given rise to many questions of international law, and their arrest on and removal from an English vessel has been made a ground of complaint by Great Britain. These individuals were once Senators of the United States. For the past few months, however, they have been engaged in a traitorous conspiracy to overthrow the government of which they are subjects, and in furtherance of that object have, with others, formed a government of their own, which has been recognised by England and France as a belligerent power. When arrested they were on their way to Europe, on board the TRENT, (a merchant vessel carrying the mail and belonging to persons subjects of the Queen of Great Britain,) as commissioners of the government they had thus helped to form, and for the purpose of obtaining the assistance of European nations in their treasonable endeavors. They first fled from the United States to Havana, and there, after making known their object and position, took passage and were received on the TRENT,

and thus set sail for Southampton. While on the voyage the TRENT was intercepted by the SAN JACINTO, a public armed vessel of the United States, under command of Captain WILKES, Messrs. MASON and SLIDELL *were removed to the* SAN JACINTO, *and the* TRENT *was allowed to proceed on its passage.*

In discussing the questions that arise from these facts, or in discussing any legal question, it is not to be expected that a precedent will always be found agreeing in every particular with the case at issue. Besides, in settling international relations, a precedent is not the most satisfactory authority, for there is, in reality, no tribunal before which questions between States can be adjudicated, and, therefore, a decision in one country may not be adopted by another. But all international law is founded on certain great principles of right, and a decision made is only an illustration of some such principle.

If, therefore, we would come to a correct conclusion as to the rights of nations in any particular instance, we must first understand, and, during such a discussion, always remember, what is the foundation, source and object of international law. Here, too, we can have no difficulty, for all modern writers agree in stating that the law of nations consists in the application of the principles of natural justice to international relations, and that the great object is to work out as little harm as possible to one another. As PHILLIMORE, in his learned work, (page 48, vol. 1,) says:

"From the nature, then, of States, as from the nature of individuals, certain rights and obligations towards each other necessarily spring. These are defined and governed by certain laws. These are the laws which form the bond of justice between nations, '*quæ societatis humanæ vinculum continent*,' and which are the subject of international jurisprudence, and the science of the international lawyer—*jus inter gentes.*"

And then, on page 49, the same writer adds: "To secure, by law, throughout the world, the maintenance of right against the aggression of the national wrong-doer, is the primary object of the commonwealth of States, and the great duty of the society of societies."

KENT, also, in his Commentaries (vol. 1, page 2) says:

"The law of nations is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relations and conduct of nations, and of a collection of usages, customs and opinions, the growth of civilization and commerce; and of a code of conventional or positive law. In the absence of these latter regulations, the intercourse and conduct of nations are to be governed by *principles fairly to be deduced from the rights and duties of nations and the nature of moral obligations.*"

WHEATON, also, (*Wheaton's Elements of International Law*, page 22,) gives utterance to the same idea when he says: "International law, as understood among civilized nations, may be defined as consisting of those rules of conduct *which reason deduces as consonant to justice*, from the nature of the society existing among independent nations."

But we will not multiply these citations. It is evident that here is the foundation of all international law—the working out of the principles of natural justice, so that each State may exercise equal rights, and receive no unnecessary harm or injury from any other State. Of course, there is a code of conventional or positive law which may be gathered

from treaties of peace, alliance and commerce, declaring, modifying or defining the pre-existing international law. But no such treaties will be found to be opposed to this great principle of justice, except it may be in the case of some individual nation, which has, perhaps, sold its birthright for a mess of potage. A treaty of that kind, however, could not, of course, ever reach the dignity of law, as between nations other than the contracting parties, and cannot, therefore, need noticing here.

Growing out, then, of this ruling principle, is the right of self-preservation, which, as PHILLIMORE says, (vol. 1, page 226,) "is the first law of nations as it is of individuals." WHEATON (page 85) expresses the same idea a little more fully. He says: "Of the absolute international rights of States, one of the most essential and important, and that which lies at the foundation of all the rest, is the right of self-preservation. It is not only a right with respect to other States, but a duty with respect to its own members, and the most solemn and important which the State owes to them. This right necessarily *involves all other incidental rights which are essential as means to give effect to the principal end.*"

So, also, KENT, in his Commentaries, (vol. 1, page 23,) says: "Every nation has an undoubted right to provide for its own safety and to take due precaution against distant as well as impending danger. The right of self-preservation is paramount to all other considerations."

PHILLIMORE (on page 227, vol. 1) shows the extent and force of this principle, when he adds:

"International law considers the right of self-preservation as *prior and paramount to that of territorial inviolability*, and where they conflict, justifies the maintenance of the former at the expense of the latter right."

So, also, we find VATTEL (vol. 3, c. 7, § 133) maintaining the same view: "It is certain that if my neighbor gives refuge to my enemies when they would have been worsted, and have found themselves too feeble to escape me, leaving them time to collect themselves and to watch for an occasion to try a new invasion of my land, this conduct, so prejudicial to my safety and my interests, would be incompatible with neutrality. When, then, my vanquished enemies withdraw themselves to his domain, if charity does not permit him to refuse them passage and safety, he ought to make them pass beyond or outside as soon as possible, and not to suffer them to lie in wait to attack me afresh. Otherwise he gives me the right to go and seek them upon his land."

There are also in the books many cases illustrating the great extent to which this principle has been carried. We shall, however, content ourselves with the citation of but one of them, which is familiar to all. We refer to the case of the capture of the CAROLINE, in 1838. It will be remembered that Great Britain alleged the Canadian rebels not only found shelter on the American frontier of the Niagara, but that they obtained arms by force from the American arsenals, and that shots were fired from an island within the American territories, while a steamer called the CAROLINE was employed in the transport of munitions of war to the island, which, when not so employed, was moored off the American shore. In this state of things a British captain and crew having boarded, forcibly captured and fired the CAROLINE, cut her adrift and sent her down the falls of Niagara. The act was made the subject of complaint by the American government, on the ground of violation of territory, and vindicated by Great Britain on the ground of self-preservation. If

this version of the facts was correct, it was undoubtedly a complete vindication of the act.

Thus, then, we see how far this right of self-preservation allows a nation to go, in enforcing its rights. And might we not stop here and show that there is, as a mere matter of principle, very little difference between entering upon neutral territory, as the English thus did, for the purpose of seizing the vessel in question, and the visiting and searching the ship of a neutral and taking from it rebels who were on their way to a neutral territory for the purpose of there plotting and working out the destruction of their country? Were there no law known among nations, giving a State the right, under such circumstances, of visiting a neutral vessel and obtaining possession of such agents of evil, certainly this law of self-preservation would dictate and necessitate it.

But there is still another fundamental principle of international law, regulating the acts of neutrals during a war, which principle naturally follows from the foregoing. We have seen above, that where a neutral harbors either belligerent, his territory loses its inviolability. From this rule we easily deduce the more general one, that a neutral must not take any part in the contest; he has no right to favor or injure either belligerent. This principle—so eminently just in itself—is too familiar to need more than a passing notice. Among the nations of antiquity, the right of one to remain at peace while other neighboring nations were engaged in war, was not admitted to exist. He who was not an ally was an enemy. But since international relations were "regulated by the principles of justice applicable to those relations," a different rule has existed, and 'middle-men,' as GROTIUS calls them, will be found during every conflict. If, however, a nation would hold the office of a neutral, and retain the rights and privileges of such a position, all its acts must be free from favor towards either belligerent. BYNKERSHOEK says, (*Bynkershoek, Quaest. Jur. Pub.* lib. 1, cap. 9:) "The duty of neutrals is to be every way careful not to interfere in the war, and to do equal and exact justice to both parties; * * * as to what relates to the war, let them not prefer one party to the other, and this is the only proper conduct for neutrals." PHILLIMORE, in treating of this same subject, says, (vol. 3, page 202:) "The neutral is justly and happily designated by the Latin expression *in bello medius.* It is of the essence of his character that he so retain this central position as to incline to neither belligerent. He has no *jus belli-cum* himself; but he is entitled to the continuance of his ordinary *jus pacis*, with, as will presently be seen, certain curtailments and modifications which flow from the altered state of the general relations of all countries in time of war. *He must do nothing by which the condition of either belligerent may be bettered or strengthened—quo validor fiat.*"

In the light of these citations, and numberless others to the same effect that might be made, can there be any doubt but that the captain of the TRENT was doing an hostile act in conveying, as he did, the commissioners of the Confederate States? Was he not doing all he could to benefit one belligerent and injure the other? It will not be pretended that the character of these persons, and the object of their mission, was unknown. If any harm could be done the United States, it was known that it was the object of these commissioners to do it. The captain of that vessel lent himself to the service of the Confederate States for that purpose, and, in doing so, grossly violated the character

of a neutral. We submit, therefore, that the principle of self-defence, so nobly illustrated by Great Britain in the case of the CAROLINE above referred to, would, under such circumstances, require us to prevent the consummation of such an act by similar means, did the law of nations furnish no other remedy.

But still there was no necessity for following such an extraordinary precedent, nor could we be justified in doing so, since (if for no other reason) we have a very simple remedy, and, had it only been properly used, an effectual one; for, growing out of the foregoing principles, has arisen the doctrine of contraband of war; and the right of visit and search *in time of war* necessarily follows. We have seen above that a neutral has no right to strengthen or injure either belligerent. As a conclusion, then, from this principle, certain articles have been admitted by all nations to be contraband, and the general freedom of neutral commerce with the respective belligerent powers is, therefore, subject to such exceptions. The reason for this restriction exists in the fact, as we have stated, that "the principles of natural justice require" no assistance in the war should be furnished by a neutral to either party. As Mr. JENKINSON, afterwards Lord LIVERPOOL, in his "discourse on the conduct of Great Britain to neutral nations," in 1758, says:

"The liberty of navigation, in fair construction, can mean no more than the right of carrying to any mart, unmolested, the product of one's own country or labor, and bring back whatever may be received in return for it; but *can it be lawful that you should extend that right to my detriment—that you should exert it in the cause of my enemy?*"

If, therefore, we wish to determine, at any time, whether any article is contraband, all we have to know is whether the article in question would necessarily help to advance the interests of either belligerent. Warlike instruments or materials, by their own nature, fit to be used in war, are not the only weapons a belligerent can make serviceable. *Strategy is frequently more effective than bullets.* Therefore, all messages or messengers, despatches or commissioners, sent by a belligerent for the purpose of strengthening his cause in the war, are contraband.

We thus reach this position as a natural and necessary conclusion from the foregoing principles, and one could not but feel perfect confidence in its correctness, even had nothing ever been written or decided on this point. For it is pre-eminently just that my friend (a neutral) should not be allowed to help my enemy. This would seem to be particularly the case when a nation is laboring to put down a rebellion that threatens its very existence. Then, if ever, a neutral should keep aloof; for if she is to assist such an enemy in its strategic movements, (in its endeavors to obtain the help of other nations to assist in the destruction of its country,) how tenfold worse than an open enemy she becomes. But, as we have seen, the ability legally to do such injustice does not exist, and a moment's examination will show us that all writers on international law unite in declaring, in the broadest terms, despatches and commissioners, or embassadors, contraband.

We find this doctrine very clearly laid down by PHILLIMORE, in his work on international law, which we have several times before referred to. He says, (vol. 3, page 370:)

"*Official despatches from an official person on the public affairs of the belligerent government impress a hostile character upon the carriers of them,*

The mischievous consequences of such a service cannot be estimated, and extend far beyond the effect of any contraband that can be conveyed, for it is manifest that by the carriage of such despatches the most important operations of a belligerent may be forwarded or obstructed. In general cases of contraband the quantity of the article carried may be a material circumstance, but the smallest despatch may suffice to turn the fortunes of war in favor of a particular belligerent."

On page 369 of the same volume he adds: "As to carrying of military persons in the employ of a belligerent, or being in any way engaged in his transport service, it has been most solemnly decided by the tribunals of international law, both in England and the United States of North America, that these are acts of hostility on the part of the neutral, which subject the vehicle in which the persons are conveyed to confiscation at the hands of the belligerent."

Wildman, in his *Institutes*, makes use of the following language:

"It is *the right of the belligerent to intercept and cut off all communication by despatches.* It is not to be said, therefore, that this or that letter is of small moment. The true criterion will be, is it on the public business of the State, and passing between public persons in the public service? *If the papers so taken relate to public concerns, be they great or small, civil or military, the court will not split hairs*, and consider their relative importance. What appear small words, or what may, perhaps, be artfully disguised, may relate to objects of infinite importance."

So, also, Chancellor Kent, (vol. 1, page 152,) says:

"There are other acts of illegal assistance afforded to a belligerent besides supplying him with contraband goods, and relieving his distress under a blockade. *Among these acts, the conveyance of hostile despatches is the most injurious, and deemed to be of the most hostile and noxious character.* The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the *transmission of despatches may be conveyed the entire plan of a campaign*, and it way lead to a defeat of all the projects of the other belligerent in that theatre of the war. *The appropriate remedy for this offence is the confiscation of the ship;* and in doing so, the courts make no innovation on the ancient law, but they only apply established principles to new combinations of circumstances. There would be no penalty in the mere confiscation of the despatches. *The proper and efficient remedy is the confiscation of the vehicle employed to carry them;* and if any privity subsists between the owners of the cargo and the master, they are involved by implication in his delinquency."

Wheaton, also, is equally explicit on this point. He says, (page 562:) "Of the same nature with the carrying of contraband goods is the transportation of military persons or despatches in the service of the enemy."

Then, on page 565, we find this same learned commentator quoting and approving of the following extract from the opinion of Sir William Scott, in the case of the Orozembo, (*Robinson's Adm. Rep.* vol. 6, p. 430:)

"The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but *in the transmission of despatches may be conveyed the entire plan of a campaign that may defeat all the projects of the other belligerent in that quarter of the world.* It is true, as has been said, that one ball might take off Charles XII., and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events it is a sort of eva-

nescent quantity, of which no account is taken, and the practice has been, accordingly, that it is only in considerable quantities that the offence of contraband is contemplated. *The case of despatches is very different;* it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences; it is a service, therefore, which, in whatever degree it exists, can only be considered in one character, as *an act of the most noxious and hostile nature.*"

This principle has also been frequently recognised and adopted by the English government in her official acts. In the declaration of war by England against Russia, of the 28th March, 1854, we find the following language:

"It is impossible for Her Majesty to *forego her right of seizing articles* contraband of war, and of *preventing neutrals from bearing enemies' despatches.*"

So, too, in the recent proclamation of neutrality of May 13, 1861, made with reference to this very war, the following language is used:

"And we do hereby warn all our loving subjects, and all persons whatsoever entitled to our protection, that if any of them shall presume, in contempt of this our royal proclamation and of our high displeasure, to do any acts in derogation of their duty as subjects of a neutral sovereign in the said contest, or in violation or contravention of the law of nations in that behalf, as, for example, and more especially by entering into the military service of either of the said contending parties, * * *or by carrying officers*, soldiers, *despatches*, arms, military stores or materials, *or any article or articles considered and deemed to be contraband of war, according to the law or modern usage of nations*, for the use or service of either of the said contending parties—all persons so offending will incur, and be liable to the several penalties and penal consequences by the said statute, or by the law of nations in that behalf imposed or denounced. And we do hereby declare that all our subjects and persons entitled to our protection who may misconduct themselves in the premises, *will do so at their peril*, and of their own wrong, and that *they will in no wise obtain any protection from us against any liabilities or penal consequences, but will, on the contrary, incur our high displeasure by such misconduct.*"

Could any thing be clearer than the position taken by all commentators, and by England herself, on this very question? But we forbear making further citations to the same effect. Nor can it be necessary to add any thing for the purpose of showing that if despatches are thus objectionable, embassadors (living despatches) are still more objectionable. It would, indeed, be a very strange doctrine to insist that, although the despatches are contraband and can be seized, yet you must not seize the embassador who carries them, and who has, probably, committed them all to memory. But the question is too plain to admit of discussion or comment. It cannot be urged either that these embassadors were exempt from arrest, since such exemption does not, and has never been claimed to attach to their person until after they have arrived at their destination. *They may be stopped at any time on their passage.*

In the case of the CAROLINE, (6 *C. Robinson*, 467,) Sir WILLIAM SCOTT (afterwards Lord STOWELL) says, on this point:

"The limits that are assigned to the operations of war against them, by VATTEL and other writers upon these subjects, are that you may ex-

ercise your right of war against them wherever the character of hostility exists; *you may stop the embassador of your enemy on his passage.*"

Dr. PHILLIMORE also says, (*Commentaries*, p. 368,) that—

"*It is, indeed, competent to a belligerent to stop the embassador of his enemy on his passage.*"

And WHEATON (p. 566) approves of and quotes the opinion of Sir WILLIAM SCOTT, above referred to, as follows:

"The limits assigned to the operations of war against embassadors by writers on public law are, that the belligerent may exercise his right of war against them wherever the character of hostility exists. *He may stop the embassador of his enemy on his passage*, but when he has arrived in the neutral country and takes on himself the functions of his office, and has been admitted in his representative character, he becomes a sort of middle-man, entitled to peculiar privileges, as set apart for the preservation of the relations of amity and peace, in maintaining which all nations are in some degree interested."

Thus we will find this principle incorporated into all the text-books, and rightly so. For embassadors and despatches of an enemy may, as we have seen, work out the greatest harm to the other belligerent, and hence a neutral cannot be allowed to carry either towards their destination; they are contraband.

But from this doctrine, as we have said above, necessarily flows the right of visit and search in time of war.

As VATTEL says, (*Book* 3, ch. 8, § 11:) "We cannot prevent the conveyance of contraband goods without searching vessels that we meet at sea; we have, therefore, a right to search them." CHITTY, in his notes to VATTEL, says: "Clearly the right of search exists practically as well as theoretically." MANNING says, p. 350: "The right on the part of ships of war to search merchant vessels during the continuance of war has been granted by all writers of any authority. The right of search is, indeed, a sort of necessary complement to the right of confiscating contraband and the property of enemies." HAZLETT and ROCHE, Ed. 1854, pp. 270, 272, after laying down the same rule, say: "The duty of self-protection sanctions this right. It is founded upon necessity, and is exclusively and strictly a war right, and does not rightfully exist in time of peace."

Chancellor KENT also expresses himself with his usual clearness on this point:

"In order to enforce the rights of belligerent nations against the delinquencies of neutrals, and to determine the real as well as the assumed character of all vessels on the high seas, *the law of nations arms them with the practical power of visitation and search.* The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty. All writers upon the law of nations and the highest authorities acknowledge the right in time of war, as resting on sound principles of jurisprudence, and upon the institutes and practice of all great maritime powers. *And if, upon making the search, the vessel be found employed in contraband trade, or in carrying enemy's property, or troops, or* DESPATCHES, *she is liable to be taken and brought in for adjudication before a prize court.*"

Mr. Mercy, British Minister at Copenhagen, in 1800, wrote to Count Bernstoff:

"The right of visiting and examining in the open sea merchant vessels, of whatever nation, or whatever may be their destination, is regarded by the British government as the incontestable right of every nation at war."

Lord Whitworth, the special envoy, wrote on the same occasion:

"The right claimed by the King of England is the necessary result of the state of war. If the principle is once admitted, that a Danish frigate can guarantee from search six merchant vessels of that nation, it follows, naturally, that any power can extend protection over all the enemies' commerce. All that is required is to find in the world some one neutral state, however insignificant, sufficiently friendly to our enemies to be willing to lend her flag to cover their commerce without any risk to herself—for once the power of search is taken away, fraud will no longer fear discovery."

This doctrine, however, cannot be more strongly stated than it was by Lord Stowell, in the case of the Maria, (1 *Rob. Rep.* p. 340,) as follows:

"The right of visiting and searching merchant ships upon the high seas, *whatever be the ships, whatever be the cargoes, whatever be the destinations*, is an incontestable right of the lawfully-commissioned cruisers of a belligerent nation. * * * This right is so clear in principle that no man can deny it who admits the legality of maritime capture. * * * The right is equally clear in practice, for practice is uniform and universal upon this subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it. In short, no man, in the least degree conversant with subjects of this kind, has ever, that I know of, breathed a doubt upon it."

This right, then, of visit and search, and these principles of contraband of war being thus plain and incontestable, the fact that these commissioners went on board the Trent at a neutral port, can in nowise weaken or alter the above conclusions. That fact might be of importance (on the question of confiscating the vessel) if a plea of ignorance were made, as was, for instance, in the case of the Rapid; (*Edwards' Adm. Rep.* 228;) but no such plea can be put in here, nor are we discussing any question as to the disposition of the vessel. In the case we refer to the court said:

"It must be understood, that where a party, for want of precaution, suffers *despatches* to be conveyed on board his vessel, the plea of ignorance will not avail him. His caution must be proportioned to the circumstances under which such papers are received. If he is taking his departure from a hostile port in a hostile country, and, still more, if the letters which are brought to him are addressed to persons resident in a hostile country, he is called upon to *exercise the utmost jealousy* with regard to what papers he takes on board. On the other hand, it is to be observed, that where the *commencement of the voyage is in a neutral country, and it is to terminate at a neutral port*, or, as in this instance, at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite his vigilance, and therefore it may be proper *to make some allowance for any imposition which may be practiced upon him.*"

This same distinction is also referred to by PHILLIMORE, (vol. 3, p. 371,) in very similar language, showing that, in the opinion of that commentator, the fact that the voyage was commenced in a neutral territory, was of importance only on the question whether the vessel should be confiscated. The despatches or embassadors would be, of course, none the less contraband. He says: "With respect to such a case as might exempt the carrier of despatches from the usual penalty, (that is, from the confiscation of his vessel,) it is to be observed, that where the commencement of the voyage is in a neutral country, and is to terminate at a neutral port, or at a port which, though not neutral, an open trade is allowed, in such a case there is less to excite the vigilance of the master, and therefore it may be proper to make some allowance for any imposition which may be practiced upon him. But when a neutral master receives papers on board in a hostile port, he receives them at his own hazard, and cannot be heard to avow his ignorance of a fact with which, by due inquiry, he might have made himself acquainted."

Besides, there would be no reason or justice in any other view of the matter. If a neutral conveys on board his vessel commissioners of a belligerent, he, of course, helps one party and injures the other, and this clearly must be so, whether he takes them from a neutral or belligerent port. This principle of non-interference by a neutral is, as we have seen above, the one from which is derived the whole doctrine of contraband of war, and must control this question, until a congress of nations or some other authorized body makes the requisite limitation in the application of the principle.

We have thus discussed these questions and reached these conclusions, relying solely on the great admitted principles of international law, (as laid down by all elementary writers,) not striving to find precedents coinciding with the facts before us. Reference might, however, be made to many cases throwing light upon the one at issue. The arrest of Mr. HENRY LAURENS, during our Revolutionary war, furnishes many points of resemblance, though we have not been able to satisfy ourselves that he was on a neutral vessel. So, too, the case of the ATLANTIC, (6 *Rob. Adm. Rep.* 440,) and of the CAROLINE, (6 *Rob.* 461,) and of the SUSAN, (an American ship condemned in the British Admiralty Court in April 1, 1803,) all tend to strengthen, if possible, the conclusions we have come to above. But we shall not enlarge upon them here, or even call attention to other cases which might be cited; for we deem the conclusions we have reached to be so clearly in accordance with every principle of international law that precedents could not add any thing to the argument.

But although the law seems to be clear on all the points we have discussed, and although we think the captain of the TRENT was acting illegally, and with the grossest injustice towards the United States, in allowing these commissioners to take passage on his vessel, still we cannot bring ourselves to believe that Captain WILKES was right in transferring Messrs. MASON and SLIDELL to the SAN JACINTO, and allowing the TRENT to proceed on her passage. These commissioners would be most certainly (were the question properly presented to any prize court in England or the United States) declared contraband, as we have seen above, and the vessel be confiscated. But that is a question a court alone has power to decide, and not the captain of a public vessel. The rule of

law is this (and there is no exception to the rule which will apply to the facts we are discussing :) that if a belligerent thinks there is any thing contraband of war on a neutral vessel, he may stop the vessel and search it. If, after such search made, he finds what he still thinks is contraband, he then has the right merely to take the vessel into port, and there a court of competent jurisdiction must pass upon it. One is not, of course, allowed to assume what will be the court's decision, and act as if it had been made, however clear the facts may appear to make the question. The law does not allow of such summary proceedings. There must be in all cases a judgment of the court before an execution can be issued. Captain Wilkes, however, assumed that the court would declare these commissioners contraband, and acted as if it had done so. Whereas he had just as much right to confiscate the vessel on the spot, as he did have to carry off these commissioners.

Since, however, this point is of the greatest importance for a proper understanding of the true position of the government of the United States on this whole question, it is well enough, perhaps, for us to examine it a little more closely, and see if we cannot discover what policy, reason and justice dictate should be our decision here. This appears to us to be particularly desirable, as our late European despatches indicate that Great Britain intends to rely solely upon this point, in the demands she may make upon us. If we, as a nation, are wrong in the step we have taken, no one will be unwilling to acknowledge it. Those who would defend most earnestly the right, are the readiest always to acknowledge error.

What, then, is the basis of all intercourse between nations ; or, perhaps we should ask, in what way do the rules of international etiquette require us to act in all our intercourse with friendly States ? The answer is most simple and familiar to every one—that we must act with the greatest comity. This means, too, as all know, not only with politeness and kindness, but with the extreme of respect, formality and consideration. An illustration will be found in the treatment embassadors must receive, and in the nature of all written communications between States. In the every day intercourse of individuals, forms and ceremonies we can frequently dispense with, but in intercourse between States no such liberty is or should be allowed. We rightly demand this of other nations, and are of course willing that they should require it of us. If this, then, is so, if the mere forms of etiquette in all friendly intercourse are insisted upon so earnestly, how far more important is it that the forms of law should be strictly complied with, when we are enforcing our belligerent rights against neutrals. It must be remembered, too, in this connection, that the right to interfere in any way with neutral commerce is not an absolute right, but one granted by neutrals, because justice and the necessities of nations require it. But in granting the right, the mode of executing it has at the same time been laid down, and is a part really of the grant itself. How imperative is it, therefore, that one should, in executing such a right between such parties, act in accordance with law, and not illegally.

But again we have seen above what is required of a belligerent in executing this right; that, while granting the privilege, safeguards have been thrown about the neutral nation and neutral commerce, so that no mere suspicion, nor even any supposed knowledge of individuals, can take final

action in the premises. We have also seen how just and reasonable it is that this should be so. In our own State we have, as citizens of that State, granted to all others certain rights as against us; but we are very careful that the manner of executing such rights should be strictly legal. What should we think of the man who, because he deems his claim just, appropriates our property to himself before the court has passed upon the claim itself? As we have said before, we always require a judgment before an execution can be issued. And can a neutral nation for a moment admit a different rule? Can she allow a belligerent to usurp the position of a court, and determine that what she is carrying is contraband? Can she allow the belligerent to confiscate the so-called contraband goods without even the form of a trial? Why, piracy in its worst phase would be hardly worse than such a state of law, or, we might better say, lawlessness.

Then, too, there is no nation in the world that ought to be more earnest than our own in endeavoring to prevent such a case passing as a precedent. We have always been battling for the rights of neutrals and against the encroachment of belligerents. And how clearly is it for our interest still to do so, unless we intend to indefinitely increase our naval force. And even then, could we ever submit to allow belligerents thus to interfere with our commerce, to permit captains of vessels to usurp the position of the court, and seize and carry off goods, letters and passengers, because, in his opinion, they were contraband? But the case is too evident an invasion of neutral rights to require argument. We submit, therefore, we are clearly wrong in endeavoring to support this act of Captain Wilkes. It is evidently against our interest, against all reason and justice to do so, and it only remains, therefore, for us to repudiate the act, make what reparation we can, and by no means ever allow it to remain as a precedent.

In regard to our giving up Messrs. Mason and Slidell, there cannot, in our opinion, be a doubt as to its being our duty to do so. No one can feel more strongly than we do the baseness of the crime those men have committed, nor would any one speak in severer terms of the unfriendliness of the act of the captain of the Trent in giving them a passage; and we believe that England will be entirely willing, if we demand it, to make any reparation she can for this violation of her neutrality. But these considerations do not, in our opinion, affect our position and duty. If we have done illegally in seizing these commissioners, certainly we must set ourselves right. An apology or a repudiation of the act would, of course, amount to nothing, so long as we retained the benefit of the act. If we are wrong, we cannot get right until we have given up the advantage we have obtained by our wrong. Had Captain Wilkes taken the vessel and appropriated it to himself and crew, before any court had passed upon the questions involved, what would an apology amount to unless accompanied with an offer to restore the vessel or its equivalent.

Neither is our position an anomalous one. It is always necessary in legal proceedings that we should proceed rightly, or else pay the penalty of our mistake. A litigant may have the justest claim on earth, and still, if he comes into court incorrectly, he will be nonsuited, and perhaps lose his claim, and have to pay his adversary's costs. We may say this is not just; and yet, if we reflect a moment, we will see that the law is not to blame. It furnishes every claimant with a remedy, but if one fails to take the proper course for obtaining redress, it is the ignorance of the

claimant, and not the injustice of the law, that works out the evil. So in this case we had a remedy, and had we proceeded properly we should have obtained all we desired. But, instead of that, we have committed an error, and must, without doubt, suffer the penalty of our mistake. It is certainly an unfortunate affair; but we do not, of course, think any blame should attach to Captain Wilkes. He acted necessarily without instructions, yet his motives and intentions were in the highest degree praiseworthy. He was truly endeavoring to serve his country in seizing the commissioners, and to accommodate the passengers of the Trent and show England his good will by not detaining the vessel. That he did not at once see the full force of the law of the case, is not at all to be wondered at. A good captain is not frequently an experienced lawyer.

Still neither these good motives nor ignorance of the law can alter the legal effect of the act, and we see, therefore, no escape from the unpleasant duty of delivering up these commissioners, if England demands it of us properly.

But, on the other hand, we have a very serious claim on England, growing out of this transaction, which should be adjudicated. We have seen above that the captain of the Trent grossly violated the character of a neutral in lending himself to the service of the Confederate States; that he did all he could to benefit one belligerent and injure the other. If so decided an injustice as this, so evident a violation of international law is to go unrebuked, we think all would unite in saying *that even war itself is preferable to such neutrality.* But in our opinion England has no wish to do us, at the present time, an injustice. It is not strange that she, like any other nation, should first consult her own interest, nor that the upholders of a monarchy should suppose they see in our existing difficulties the natural decay of free institutions. All this must be expected, their view of our troubles being from a different stand-point and through a different medium from ours. If, therefore, she is simply just in her acts towards us, and neutral in her position, we have no right to demand or hope for more, and this much we believe she will willingly grant us. When, therefore, the proper demand is made on her, all the reparation we could ask for this unfriendly act of the captain of the Trent we shall undoubtedly receive. A somewhat similar case happened in 1847, during our war with Mexico. In August of that year the British mail packet Teviot, Captain May, carried over from Havana to Vera Cruz General Paredes, ex-President of Mexico. Our government, through Mr. Bancroft, our Minister at London at the time, presented the matter to the British Cabinet, complaining of this act of Captain May, and demanding his dismissal from the service of his government. Lord Palmerston, November 16, 1847, admitted the justice of our complaint, and announced that the offending officer had been dismissed.

A similar demand made now in the case of the Trent will, in our opinion, bring a similar result. At all events, let us not go to war so long as we are in the wrong, and until we have just cause of complaint, which cannot be settled in a less violent way.

SURVEY OF THE ISTHMUS OF DARIEN.

REPORT BY E. CULLEN, M. D., M. R. C. S. E.

66 *North Cumberland-street, Dublin, November*, 1861.

I HAVE lately learnt with great satisfaction that several French engineers, under the direction of M. BONARDIOL, have made a partial exploration of the Isthmus of Darien, and are to sail for Darien again next month, to make a detailed survey of the line for a ship canal between the Atlantic and Pacific Oceans. There is thus, at length, a prospect of this grand project being carried into execution. The line about to be surveyed, which was discovered by me in 1849, after several long and perilous explorations in different directions through the forests, extends from the Gulf of San Miguel, on the Pacific, in a direction N. E. by E. $\frac{1}{2}$ E. by compass, to Caledonia Harbor and Port Escoces on the Atlantic. The Gulf of San Miguel receives numerous rivers, the largest of which are the Tuyra and the Savana, which unite together just before falling into it. The Savana is navigable for the largest ships up to the confluence of the Lara with it, that is, for fourteen miles towards the Atlantic. From the confluence of the Lara with the Savana, at which point the future canal will commence, the line extends to the Chuquanaqua, a distance of 12 miles. From the Chuquanaqua the line follows the bed of the Sucubti, one of its tributaries, up to the confluence of the Asmati with the Sucubti, a distance of nine miles; and then continues along the bed of the same river Sucubti to a point nine miles higher up. From that point to the Atlantic the distance is six miles. The whole length of the projected canal will therefore be 35 nautical, or nearly 41 English miles.

After my first explorations in 1849, for which previous travels in the interior of British Guiana, (Demerara, Essequibo, &c.,) Spanish Guiana, (Venezuela,) and many other forest countries in both hemispheres had well qualified me, I made subsequent voyages to and explorations in Darien in 1850, 1851 and 1852, alone, and at my own expense. I then proceeded to Bogota, the capital of New-Granada, where I applied to the Congress, who passed a law, granting a privilege for cutting the canal, together with a concession of all the lands necessary, and of 200,000 acres in addition, to EDWARD CULLEN, CHARLES FOX, JOHN HENDERSON and THOMAS BRASSEY. The above law received the *exequatur* of JOSE HILARIO LOPEZ, the President, and of JOSE MARIA PLATA, the Secretary for Foreign Affairs, on the 1st of June, 1852.

Soon after my return to London with the concession, the Atlantic and Pacific Junction Company was formed, with the object of carrying the project into execution. On the 29th of March, 1853, the Emperor NAPOLEON gave an audience to a deputation of fifteen, consisting of Sir CHARLES FOX, Mr. BRASSEY, several of the directors of the company, and myself, invited us to dine with him at the Tuileries, and declared his determination to cut the canal, if it were practicable.

On the 17th of December, 1853, Mr. LIONEL GISBORNE, Messrs.

Forde, Bennett, Devenish, Armstrong and Bond, the company's engineers, and myself, sailed from Southampton in the West India mail steamer Orinoco, for St. Thomas, whence the assistant engineers proceeded to Navy Bay and Panama, and thence to the Gulf of San Miguel and the River Savana, to survey the line from the Pacific towards the Atlantic side; while Mr. Gisborne and myself proceeded to Jamaica, in the Teviot, and thence, in H. M. S. Espiegle, to Caledonia Harbor, where we arrived on the 21st of January, 1854. In February and March, 1854, H. M. S. Espiegle, Commander Hancock, H. M. S. Devastation, Commander De Horsey, the French war steamer Chimere (*avis*), Capt. Jaureiguiberry, and the United States sloop of war Cyane, Capt. Hollins, lay at anchor in Caledonia Harbor; and H. M. steamer Virago, Commander Marshall, lay in the Savana River, with the object of affording assistance to the engineers. At the same time H. M. surveying ship Scorpion, Commander Parsons, was engaged in surveying the Atlantic harbors and coast for the Hydrographic Office. It may be necessary to state that no British, French or American man-of-war had ever before anchored either in Caledonia Harbor or in the Savana River. During the above two months, the line, from the Pacific to the point on the Sucubti, mentioned above as being six miles distant from the Atlantic, was surveyed by the assistant engineers, and found, so far, to present every facility for the excavation of a canal. But, of the six miles not surveyed, Mr. Gisborne, after a most cursory, hurried and imperfect reconnoissance in a wrong direction, reported that three miles would require to be tunnelled, although he admitted, in the same report, that "his examination of the country was by no means complete." Upon this, the company, deeming the presumed necessity for a tunnel a formidable obstacle, immediately dissolved, returning the shareholders the amounts of their deposits, without any deduction.

Five months afterwards, however, the Admiralty published the "Survey of Caledonia Harbor and Port Escoces," by Commander Parsons, of H. M. surveying ship Scorpion, in which a wide and low valley is plainly laid down immediately to the northwest of the mountain, which, according to Mr. Gisborne's report, would render a tunnel necessary. The existence of that valley, which is marked in Parson's "Survey" precisely in the position assigned to it by me four years before the expedition went out, completely obviates the necessity for a tunnel. I repeatedly offered to guide Mr. Gisborne to it, and had accompanied the expedition for that purpose; but that gentleman was actuated by so strong a desire to find out a valley for himself, and to mark out a line in a direction different from that indicated by me, that he not only refused me permission to accompany him, but gave directions that I was not to be allowed to leave the ship, so that I was actually a prisoner on board the Espiegle while Mr. Gisborne was "botching" my project. Having failed in his rambling and ill-directed attempts to find a valley between the range of mountains which runs parallel to the coast, Mr. Gisborne hastily "concluded his surveying operations on the 29th of March," and returned to London with his celebrated report about the tunnel, which threw complete discredit on my statements. Fortunately for me, however, the survey made by that distinguished officer, Commander Parsons, completely stultifies Mr. Gisborne's report, and confirms the veracity and accuracy of my original statements as to the existence of the valley.

In 1857, the Emperor NAPOLEON carefully examined the maps, plans and documents which I submitted to him, and referred the question to a commission of engineers of the Corps Imperial des Ponts et Chaussees. The report drawn up by that commission, and presented to the Emperor by Count WALEWSKI, was decidedly in favor of the practicability of the canal without a tunnel.

In 1859 I went again to Bogota, and on my return to Paris I had the honor, on the 30th of October, of a third audience with the Emperor, who declared his decided conviction of the feasibility of the canal, saying that he could see no difficulty in it, and expressed his determination to cut it. I hope that the expedition about to sail, the sending out of which may be considered as the first step towards the carrying out of His Majesty's determination, may conduct its operations in a scientific manner, and avoid the errors which proved fatal to the success of the expedition of 1854.

RIGHT OF SEARCH.

Opinion of Lord BROUGHAM *in* 1807.—In the October number of the *Edinburgh Review*, for 1807, is an elaborate article, by Lord BROUGHAM, on the rights of neutrals. The following passage taken from it shows what was his opinion as to the right of search at that period, and the reason why such a right is a part of the law of nations:

"It is evident that the right to search a foreign vessel for deserters is of the very same nature, and governed by the same rules, with the right to search a neutral vessel for contraband goods. You have a right to search for those goods only because you are injured by their being on board the vessel which trades with your enemy; you have a right to search for your own runaway seamen who take shelter in the vessel, because you are injured by their being enabled to escape from you. If a neutral carries contraband goods, such as armed men, (which indeed treaties frequently specify in the list,) to your enemy, he takes part against you; and your remedy—your means of checking his underhand hostility—is to stop his voyage, after ascertaining the unfair object of it. If the same neutral gives shelter to your seamen, he takes part with your enemy; or, if you happen not to be at war, still he injures you; and your remedy, in either case, is to recover the property, after ascertaining that he has it on board. In both instances the offence is the same—the foreign vessel has on board what she ought not to have consistently with your rights. You are therefore entitled, say the jurists, to redress; and a detection of the injury cannot be obtained without previous search.

PEORIA AND OQUAWKA RAILROAD.

We have received from the President of the Peoria and Oquawka Rail-Road Company a statement to the effect that the decision on railroad mortgages reported in our December No., pp. 592. 593, is not correct. We will publish in our next No. a notice of the case.